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|---|---|---|
| SC17280 TTD | : | SUPREME COURT |
| JAMES VENTRES, ET AL. | : | STATE OF CONNECTICUT |
| v. | : | IN HARTFORD |
| GOODSPEED AIRPORT, LLC, ET AL. | : | APRIL 14, 2005 |

BEFORE:

CHIEF JUSTICE WILLIAM SULLIVAN
JUSTICE DAVID M. BORDEN
JUSTICE FLEMMING L. NORCOTT, JR.
JUSTICE RICHARD N. PALMER
JUSTICE PETER T. ZARELLA

APPEARANCES:

FOR THE APPELLANTS:
JOHN BASHAW, ESQ.

FOR THE APPELLEES:
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JANET P. BROOKS, ASST. ATTY. GEN.
DAVID H. WRINN, ASST. ATTY. GEN.
MIKE DONNELLY, ESQ.

Joy E. Franklin
Court Monitor

* * *

There was testimony in the past about planes hitting trees but not specifically with respect to these particular trees. These trees were much taller than the trees in the past.

JUSTICE BORDEN: I guess to make it more narrow, was there any evidence that this clear cutting of the entire piece was done in response to pilot complaints?

MR. BASHAW: I don't believe that there was testimony to that effect.

JUSTICE BORDEN: So, your argument is that your clients, that federal pre-emption is so pervasive that, basically, any state laws that impinge in any way on the right to do that are simply pre-empted.

MR. BASHAW: That's correct, Your Honor. That--

JUSTICE BORDEN: Trespass or otherwise.

MR. BASHAW: Well, no, not true there, Your Honor.

What our position is, Your Honor, that you do not need an order from the DOT to remove the trees. You do not need a directive from them.

If the trees protrude into the federal glide slope or if they are otherwise located in a runway protection zone and you otherwise have the property right to remove those trees, then you don't have to go get permission from the DOT. You do not need permission from the FAA to remove those trees. You can do it because you're trying to maintain air safety.

Now, you do need--

JUSTICE BORDEN: What if there were--instead of trees, what if someone had built--I mean, I know this is a land trust so it wasn't, but let's suppose it's not a land trust.

There's a building there, a house, but there are no complaints by pilots that the height of the house is impeding their take-offs or their landings.

Neither DOT nor FAA has said, We've got to do something about that house. The house is 20 or 30 feet high, whatever it is.

I take it your argument would be that because of federal pre-emption, your client could go out and bulldoze the house and he couldn't be--

MR. BASHAW: Actually, no, Your Honor

JUSTICE BORDEN: No?

MR. BASHAW: I want to be clear.

If that was my client's house--

JUSTICE BORDEN: No, no, no, no, this is a house on someone else's--

MR. BASHAW: Okay. If this is somebody else's house?

JUSTICE BORDEN: --this is the house on that land.

MR. BASHAW: No, no, I'm not making any claim, Your Honor, that this gives you the right to go onto somebody else's property, to go and cut down and remove their trees.

There's a case, I think it was City of Westchester--it's a Connecticut decision--that dealt with abrogation

easements.

I'm not making a claim that the regulations give you some sort of an easement, a right to go onto somebody else's property, but in this case, in this case that we had here, we had the property right to go onto that property and clear the trees.

What I'm saying is we had that property right but, yet, the appellees are saying, You still needed to get permission from the Inland-Wetland Commission to remove those trees, and we're going to punish you under CEPA for removing those trees.

Our position is when you have the property right to go do the work, then you cannot have local interference or state interference with that activity.

That's our position, Your Honor.

JUSTICE BORDEN: So your argument for federal pre-emption, I'm not sure I understand its relation to the easement.

Your clients claimed a prescriptive easement. I mean, if--

MR. BASHAW: And the Trial Court so found, but, yes--

JUSTICE BORDEN: But that's challenged.

MR. BASHAW: That's correct.

JUSTICE BORDEN: I mean, it's not like they had a deed, you know, an easement by deed which said you have the right to do this.

MR. BASHAW: That's right.

JUSTICE BORDEN: They went and they did it and the Trial Court agreed with the. The other side challenges that in their cross appeal--

MR. BASHAW: Correct.

JUSTICE BORDEN: --but I'm still trying to--that's a matter of state property law.

MR. BASHAW: I agree, Your Honor.

JUSTICE BORDEN: How does that affect, one way or the other, whether you're pre-empted?

It seems to me if your pre-emption argument is correct, it's correct irrespective of whether you had an easement to do that. Isn't that so?

MR. BASHAW: Well, let me give you another example, Your Honor.

JUSTICE BORDEN: Well, no, I'm trying to--

MR. BASHAW: Yes--

JUSTICE BORDEN: --I'm trying to under--you said to me, well, you couldn't just go bulldoze somebody's house--well, your time is up but I'll have to take a little bit of it--you couldn't go bulldoze somebody's house because in this case you had an easement to cut trees.

MR. BASHAW: Right.

JUSTICE BORDEN: But I don't understand how--I thought if you have federal pre-emption because this is airspace, under federal pre-emption local laws are pre-empted, so even if this had happened in the 14th year instead of the--well, in the 16th year so you didn't have an

easement by prescription--your federal pre-emption argument would be the same, wouldn't it?

MR. BASHAW: Well, again, Your Honor, I think still pre-emption--the whole point of pre-emption is if I have the right to remove the trees.

The airport itself, the airport property itself which is located in a flood plain, all right, the Inland-Wetlands position is I have to go and get their permission to remove the trees that are on my own property.

I could get punished under CEPA, my client could get punished under CEPA for removing those trees on his own property. That's what's pre-empted. You can't let local laws affect the airport's ability to maintain clear space around its airport when it has the property right to do.

I do not claim--

JUSTICE BORDEN: So, then, are you saying that your pre-emption argument rests on the validity of the Trial Court's finding of the prescriptive easement?

MR. BASHAW: Certainly, yeah, it doesn't give me the right. If there's no prescriptive easement, Your Honor--

JUSTICE BORDEN: Let's suppose that this had happen--let's suppose that the Trial court had rejected your easement. They said, Yes, you did it but it wasn't continuous or it wasn't open and notorious. You failed in some proof of your prescriptive easement cause of action.

MR. BASHAW: Correct. But it--

JUSTICE BORDEN: So you didn't, The Trial Court

rejected your claim of an easement. Would you still have a pre-emption argument--

MR. BASHAW: Not with re--

JUSTICE BORDEN: --on the claim of the Inland-Wetlands Commission?

MR. BASHAW: Not with respect to the East Haddam Land Trust and the Nature Conservancy land.

I would, however, still have the right because, remember, the cease and desist order that was issued to the airport prohibits them from removing vegetation on their own land.

JUSTICE BORDEN: I'm--

MR. BASHAW: But, yes, Your Honor, the answer to your--

JUSTICE BORDEN: --let's put aside your own land.

The other party's land--

MR. BASHAW: Yeah, I –

JUSTICE BORDEN: --are you saying to me now, because this is something I never understood, you're saying that your pre-emption argument is premised on your easement.

MR. BASHAW: I cannot remove the trees. Even if I have pre-emption, I cannot go onto somebody else's land and remove the trees. The FAA regulations don't permit me to do it. The DOT can come out and say those trees are a problem, I don't have the right to, but if I have not otherwise secured the property rights to go onto that land and do the work, I can't do it.

If I do have the property right, which is the facts in this case as determined by the Trial Court, then a local agency or a state agency cannot, then, step into the fray and say, No, you're prohibited from doing that because, in this case, the trees happen to be located in a wetland.

JUSTICE BORDEN: Well, I understand your argument. It just seems to me a rather novel use of federal pre-emption.

I've never heard of saying, well, the federal law is supreme and pre-empts the state law only if the person claiming it has some state law right to do what he's doing.

I thought pre-emption is pre-emption and it doesn't matter whether you--well, now I understand your argument but I hadn't understood you to make that argument before, Mr. Bashaw. Okay.

MR. BASHAW: I think I'll just, since I'm over my time--

JUSTICE SULLIVAN: You've got 21 minutes left.

MR. BASHAW: Good. I'll go into my rebuttal time.

The other portion of pre-emption is conflict pre-emption. I guess I probably won't rehash. The same argument applies to that.

You cannot have exclusive sovereignty of the airspace and you cannot effect the routes of aircraft coming into an airport if, and in this case what will happen if the trees will grow into the glide slope or grow into the RPZ and may grow onto the airport's own land, and they're prohibited

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Supreme Court, U.S.
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No. 05-1082

# In the Supreme Court of the United States

GOODSPEED AIRPORT, LLC, ET AL., PETITIONERS

*v.*

EAST HADDAM INLAND WETLANDS AND WATERCOURSES COMMISSION, ET AL., RESPONDENTS

GOODSPEED AIRPORT, LLC, ET AL., PETITIONERS

*v.*

ARTHUR J. ROCQUE, JR., COMMISSIONER OF ENVIRONMENTAL PROTECTION, RESPONDENT

**On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that the decisions below bar petitioners from clearing obstructions to air navigation—as defined by *federal* law—without first obtaining permission from *local* land use officials. Unable to explain why local land use regulators should have the final say on matters of safety involving "airspace of the United States," 49 U.S.C. § 40103(a), respondents attempt to change the subject, suggesting that this Court lacks *jurisdiction* because petitioners conceded at oral argument below that there is no preemption here.

As explained in the petition (at 12 n.4), the "concession" on which respondents rely, however, concerned preemption of *the common law of trespass*, not of *local permitting requirements*—which are the subject of the petition. The oral argument transcript (read in context), the briefs, and the rulings below all confirm that our position here was also pressed below, and that the Connecticut Supreme Court wrongly concluded that our concession concerning trespass law foreclosed our preemption defense to the application of local permitting mandates. Indeed, the order under review extends to the removal of obstructions located on petitioners' *own* property—where trespass is not an issue.

Once the fallacy of respondents' jurisdictional argument is revealed, it is evident that the petition should be granted. Respondents do not deny the importance of the question presented to the safety of 46 million flights annually. Pet. 14-19. They ignore our showing that the decisions below are at odds with the United States' position that preemption under the Federal Aviation Act is so complete as to support *removal jurisdiction*. They also ignore our showing that subjecting to local permitting rules airports' decisions to remove objects that obstruct takeoffs or landings would conflict with Congress's choice, for safety reasons, to place such decisions beyond local control. Pet. 25-30. Indeed, one searches respondents' briefs in vain for *any* reference to the

Federal Aviation Act or *any* attempt to reconcile the decisions below with the federal government's "exclusive sovereignty of airspace of the United States," including "airspace needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. §§ 40103(a), 40102(a)(30).

Although respondents deny the conflict between the decisions below and the rulings of the Ninth and Second Circuits, the decisions they cite—which admittedly reject the Ninth Circuit's view—actually confirm the breadth of the conflict on this issue of federal law. The petition should be granted to resolve this conflict and to vindicate Congress's overriding concern for air safety nationwide.

**I. This Court Has Jurisdiction.**

Relying upon an asserted "waiver" at the oral argument before the court below, respondents' principal answer to the petition—and the only response of Commissioner Rocque—is the assertion that the Court lacks jurisdiction to hear this case. Rocque Opp. 4-6; Ventres Opp. 10-17; Land Trust Opp. 2-3. Respondents acknowledge, however, that any jurisdictional requirements of 28 U.S.C. § 1257(a) are satisfied if the federal claim "was either addressed by, or properly presented to, the state court that rendered the decision" below. *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*) (emphasis added). See Ventres Opp. 11. Both of these alternative requirements are satisfied here.[1]

1. Read as a whole, the oral argument transcript shows that petitioners' counsel pressed preemption of the state regulatory claims as the chief basis for reversing the trial court, and that he conceded only that the common-law trespass claim was not preempted. Counsel stated that "federal pre-emption" is "the strongest argument" and that

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[1] It is not even clear that these requirements are *jurisdictional*. See *Adams*, 520 U.S. at 90 (explaining that it is unsettled "whether [the] requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential").

it is "dispositive of *almost all* the claims that [were] before the Court * * * with *perhaps the exception of the argument over the prescriptive easement.*" Ventres App. 7 (emphasis added). He continued:

> The two federal laws at issue in this case are Title 49, Section [40103(a)] of the Federal Aviation Act, which says very succinctly: The United States government has exclusive sovereignty of airspace of the United States; exclusive sovereignty. * * * The other federal law at issue in this case is Section [41713(b)(1)] which is under the Airline Deregulation Act. * * *
>
> So, therefore, the issue in this case, succinctly, is: Do these two federal laws, under the Federal Aviation Act and the Airline Deregulation Act, preempt and prohibit the State of Connecticut and the Inland-Wetlands Commission from *enforcing the Inland-Wetlands Act against the airport parties and punish them under CEPA for the removal of the trees*?

Ventres App. 7-8 (emphasis added); see also *id.* at App. 9-14. From the outset, then, counsel clearly distinguished issues involving petitioners' easement from issues involving preemption of local regulators' permitting requirements. See also Pet. 12 n. 4.

This distinction is vital to understanding the concession upon which respondents rely. In response to a question testing the scope of petitioners' preemption defense, petitioners' counsel stated that federal preemption did not displace the common law of *trespass*:

> JUSTICE BORDEN: So, your argument is that your clients, that federal pre-emption is so pervasive that, basically, any state laws that impinge in any way on the right to that are simply pre-empted.
>
> MR. BASHAW: That's correct, Your Honor. That—
>
> JUSTICE BORDEN: Trespass or otherwise.

MR. BASHAW: Well, no, not true there, Your Honor.

Ventres App. 24. Counsel made similar statements in response to other questions about the airport's right to enter neighboring properties to remove obstructions to air navigation. See Ventres App. 26, 29-30.

Notably, the concession appears in the context of a discussion about trespass—the airport's rights vis-à-vis the neighboring landowners. Viewed in context, the concession does not speak to the airport's rights vis-à-vis state and local regulators. The two sets of issues are distinct, and the court below could not avoid the preemption issue with respect to the state and local *regulations*—the question presented in the petition—by relying on a concession made in response to a series of questions implicating the law of *trespass*.

That petitioners vigorously contended that federal law preempts state and local permitting rules is further confirmed by a review of the briefs below. Those briefs repeatedly urged that the state and local *regulations* at issue are preempted by the Federal Aviation and Airline Deregulation Acts, but nowhere suggested that trespass law is preempted. See Brief of Defendants-Appellants in *Ventres* v. *Mellon* (A.C. 25498), ii (framing the issue as whether federal law "preempt[s] the Plaintiffs' regulation of the removal of vegetation located within the FAA approach surface and the RPZ for the Airport's runway under the Connecticut Inland Wetlands and Watercourses Act"); see also *id.* at 12-27;[2] Reply Brief of Defendants-Appellants in

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[2] See *id.* at 15 ("The trial court erroneously determined that the local IWWC can impose local permitting obligations on persons who wish to remove obstructions within the navigable airspace"); *id.* at 19 ("the FAA preempts all local and state regulation of approach zones or clear zones"); *id.* at 21 ("[r]equiring a wetlands permit to eliminate trees in the approach surfaces or RPZ" is preempted); *id.* at 25 ("a temporary and permanent injunction against any further tree cutting" and "the obligations imposed by

*Ventres* v. *Mellon* (S.C. 17280), 1 (framing the issue as "whether local regulation and enforcement of the cutting of trees in a wetland is preempted"); *id.* at 5-13. Petitioners' position has remained constant throughout this litigation.

2. Nor is this a case in which the state supreme court was silent on the federal issue, raising a presumption that the issue was not adequately presented. See *Adams*, 520 U.S. at 86-87. To the contrary, the court in *Ventres* acknowledged petitioners' preemption defense and explained why, in its view, petitioners' concession that state trespass law was not preempted meant there is no preemption *at all*: "[B]ecause the airport defendants had no right under state property law to clear-cut the land, they had no such right under federal law and, accordingly, we need not reach their claim that federal law preempts state and local land use law." Pet. App. 8a; see also *id.* at 7a-11a, 26a. That the court misapprehended the implications of the distinction between preemption of state regulatory law and of state common law does not deprive this Court of jurisdiction. Cf. *Webb* v. *Webb*, 451 U.S. 493, 495 (1981) (dismissing a writ for lack of jurisdiction where "nowhere in the opinion of the [state supreme court] is any federal question mentioned, let alone expressly passed upon").

In sum, the preemption issue that is the subject of the petition was "properly presented to" and "addressed by" the court below, and there is "an adequate factual and legal record" on which to decide it. *Adams*, 520 U.S. at 90. The assertion that this Court lacks jurisdiction is baseless.

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the IWWA (e.g., permitting) * * * are inconsistent with the obligations mandated by the Federal Aviation Act"); *id.* at 26 ("Each statute seeks a means through regulation or enforcement to restrict or punish activity that is endorsed and supported by Congress under the Federal Aviation Act").

**II. The Commission's Order Conflicts With Federal Law.**

Respondents' other stated reasons for denying the petition are also without merit. Their failure even to *cite* the Federal Aviation Act is especially telling. As we noted in the petition (at 26-28), "[t]he United States Government has exclusive sovereignty of airspace of the United States," and this airspace includes "airspace needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. §§ 40103(a), 40102(a)(30). In granting the federal government "exclusive sovereignty" over the "airspace needed to ensure safety in the takeoff and landing of aircraft," the Act bars States from applying land use laws to impede airports' ability to clear trees from approach surfaces or runway protection zones.

1. Respondents seek to avoid the force of this language by focusing on certain FAA regulations and suggesting that those regulations contain mere "recommendations." Land Trust Opp. 5; Ventres Opp. 21-22. But the very authority that respondents cite for this claim acknowledges that the "[s]afe and efficient use of airspace *requires* that areas under these imaginary surfaces be kept clear of obstacles." *Flowers Mill Assoc.* v. *United States*, 23 Cl. Ct. 182, 184 (1991) (emphasis added). And respondents do not deny that, at a minimum, application of CEPA and the Commission's regulations here frustrates the "full purposes and objectives of Congress" in adopting the Federal Aviation Act. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Moreover, even if FAA Advisory Circular No. 150/5300-13, § 211a(6) were not binding—and when an FAA rule says that "[o]bstructions to air navigation *must* be removed," we think an airport would ignore this directive at its peril—that would be irrelevant in light of the text of the Act. Given the statute's recognition of exclusive federal authority in the airspace, applications of state land use rules that impede the removal of trees or other obstructions to air navigation are preempted by the Act *without regard to FAA regulations on the subject*. The same is true of the Airline Deregulation Act,

which preempts any application of state or local regulations that affect the "route" of an air carrier. Respondents make no answer to these arguments.

2. Respondents also attempt to deny the existence of a conflict on the ground that, during the period from 1978 to 1999, when Mellon purchased the property, "the Airport had never been shut down for failure to maintain the glide path set forth" in the FAA's Part 77 regulations, despite its having a "non-conforming approach slope, a displaced threshold, or both," during 11 inspections. Land Trust Opp. 5.

The fact that the airport was not shut down prior to 1999 would come as little comfort to the victims of the airport's 1991 plane crash. See Pet. 7. Moreover, the evidence shows that a displaced threshold or steeper approach poses serious safety risks for a runway of this length, and that such risks are magnified when surface or weather conditions are less than ideal. See Pet. 27 n.4; *Flowers Mill Assoc.*, 23 Cl. Ct. at 185 ("the additional loss of landing runway is considered [to be substantially adverse] to aircraft operations" (alteration in original)). Contrary to respondents' suggestion, federal air safety regulations are not a dead letter to be ignored until someone threatens to close the airport. And the absence of such a threat does not undermine our showing that the Commission's order conflicts with federal law.

**III. Respondents' Arguments Confirm That There Is A Deep And Mature Conflict On The Issue Presented, And That The Decisions Below Conflict With The Position Of The United States In Prior Cases.**

Respondents' arguments also fail to undermine our showing that the decisions below conflict with decisions of at least two federal courts of appeals, and with the long-standing position of the United States in other cases.

1. As explained in the petition (at 19-23), the decisions below conflict with *Burbank-Glendale-Pasadena Airport*

*Authority* v. *City of Los Angeles*, 979 F.2d 1338, 1340-1341 (9th Cir. 1992), and *United States* v. *City of New Haven*, 496 F.2d 452 (2d Cir. 1974), which respectively held that airport runways and clear zones are "part of the navigable airspace" and subject to "exclusive" federal control. *New Haven*, 496 F.2d at 454; see *Burbank-Glendale*, 979 F.2d at 1341. Both of these decisions make clear that, contrary to the decisions below, state land use rules may not be applied to interfere with the clearance of approach surfaces or runway protection zones.

Respondents attempt to downplay this conflict by arguing that other courts have declined to follow the Ninth Circuit's or Second Circuit's reasoning. Ventres Opp. 24-25 (collecting five cases). For example, they cite one decision stating that "this Court joins others that have declined to follow [*Burbank-Glendale*]," and another rejecting the Ninth Circuit's "broader" view of the Federal Aviation Act. *Id.* at 24 (citations omitted). But the fact that other courts may have rejected the views of the Ninth or Second Circuit only *confirms* the extent of the conflict among the lower courts on the scope of preemption under the Federal Aviation Act.

Respondents also attempt to minimize the conflict on the ground that *New Haven* and *Burbank-Glendale* involved "property *owned by the airport*" rather than neighboring properties. Ventres Opp. 23; accord Land Trust Opp. 4. This argument fails for two reasons.

First, the validity of the city's ownership of the "clear zone" was vigorously disputed in *New Haven*—indeed, the Connecticut courts had ruled that the city's purchase of the land was invalid—but the Second Circuit expressly rejected the view that this affected the scope of federal preemption. As the court explained: "the legality under state law of New Haven's acquisition of the clear zone area is entirely separate from the question of the power of the state court to enjoin airport operations, whose regulation Congress has entirely preempted." 496 F.2d at 454. Thus, despite a state

court decision invalidating New Haven's purchase of the "clear zone," the Second Circuit held that the State's regulation of that clear zone "conflicted squarely with the regulation of navigable airspace which Congress has reserved for exclusive federal control." *Ibid.*

Moreover, although *Burbank-Glendale* involved property owned by the airport, nothing in the Ninth Circuit's opinion suggests that the identity of the landowner is relevant to the scope of preemption under the Federal Aviation Act. To the contrary, the court held that preemption extends to an airport's "surrounding airspace." 979 F.2d at 1341. Thus, as both the Second and Ninth Circuits recognize, but the court below (and various others) do not, the question that matters is whether the property at issue is part of the "airspace of the United States." 49 U.S.C. § 40103(a). If it is, then federal control is supreme and exclusive.

Second, respondents' argument ignores the scope of the trial court's cease-and-desist order and their own position below. The Commission sought and obtained an order from the trial court that prohibits petitioners from engaging in tree-removal activities *both* on the neighboring property *and on airport property.* See Pet. App. 93a-94a; Commission App. A28. The court below affirmed that order in its entirety, based on the Commission's position that permits are required to remove trees from any wetlands, no matter who owns them. The Commission cannot distinguish *City of New Haven* and *Burbank-Glendale* on the ground that they involve *airport* property while at the same time ordering petitioners to refrain from cutting trees on their own airport property.

2. The petition (at 23-25) also shows that the decisions below are at odds with the United States' position that preemption of the airspace is so complete as to support *removal jurisdiction.* See Brief for *Amicus Curiae* The United States of America, in *Vorhees* v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001). Rocque and the Land Trust ignore this point. The Commission dismisses it in a footnote (at 24